REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 532 OF 2013

ROBERT N GAKURU……..1ST PETITIONER

JAMOFASTAR WELFARE ASSOCIATION….……2ND PETITIONER

VERSUS

THE GOVERNOR KIAMBU COUNTY.……..……..1ST RESPONDENT

THE DEPUTY GOVERNOR KIAMBU COUNTY..2ND RESPONDENT

THE EXECUTIVE COMMITTEE

KIAMBU COUNTY……...……...……..…3RD RESPONDENT

THE ATTORNEY GENERAL

REPUBLIC OF KENYA…….……..…….….4TH RESPONDENT

RULING

1. On 1st October 2013, it is alleged that the Respondents published in the Kiambu County Gazette Supplement, Bills 2013 a Bill for introduction into the Kiambu County Assembly known as The Kiambu County Finance Bill. 2013.
2. Apparently the petitioners herein who are members of **Jamofastar Welfare Association** were unhappy with the said Bill and it is that unhappiness that has triggered these proceedings.
3. The petitioners contend that the said before the publication of the said Bill there was no consultation with the residents of Kiambu County in contravention of various Articles in the Constitution and County Governments Act No. 17 of 2012 under which the public participation in such matters is a mandatory requirement. It is therefore contended by the petitioners that the said Bill is unconstitutional not only for failing to adhere to the principle of public participation and inclusiveness but also that the issues dealt with in the said Bill are not within the mandate of the Respondents. It is further contended that the intended increase in rents contained in the said Bill are a negation of the provisions of Article 43(1)(b) under which every person has the right to accessible and adequate housing, and to reasonable standards of sanitation. To the petitioners the intended developments are not by the people of Kiambu but by the Executive Committee.
4. Together with the petition the petitioners filed Chamber Summons dated 5th November 2013, in which they seek an order staying the introduction into Kiambu County Assembly of the said

Kiambu County Finance Bill, 2013 pending the hearing of this petition.

5. According to **Dr Wangai**, learned counsel for the petitioners, the petitioners have moved with speed to stop the breach of the cited Constitutional provisions hence the Court ought not to wait until the breach has taken place but can take the steps to stop the breach from taking place as what is proposed to be undertaken is unconstitutional *ab initio*. It was further submitted that unless the stay is granted, the enactment of the said Bill into an Act will render the petition nugatory.
6. The application was opposed by the respondents. According to the respondents, the Court has to be satisfied that the petitioners have an arguable case before it can grant the conservatory orders sought. This submission according to **Mr Havi**, learned counsel for the respondents is premised upon **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 Of 2000 [2000] 1 EA 184**. In his submission it is incorrect that the Bill intends to impose taxes but it only seeks to levy fees and charges for services a power which the County Government has under Schedule 4 part 2 of the Constitution. With respect to the right to consultation while admitting that the petitioners have the right to be consulted it was contended that that obligation is only to avail the right while it is the obligation of the petitioners to utilise the said right and participate. According to the respondents the Bill was duly published and the public notified and invited to participate. It was further submitted that the petitioners are guilty of delay and laches and have come to court when the entire consultative stages have been undertaken and exhausted. According to the respondents, the petitioners seek to countermand the Constitutional, Legislative and Regulatory powers of the County Government which is not permissible hence the Courts ought to exercise judicial restraint in such matters.
7. I have considered the application, the affidavits both in support of and in opposition to the application as well as the rivalling submissions.
8. I agree with **Mr Havi** that in an application for conservatory orders, just as in cases for leave and as was held in **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 Of 2000 [2000] 1 EA 184**, the petitioners ought to establish a prima facie arguable case. However in the same case the Court did warn against going into the merits of the matter in depth at that stage and stated that the court should not rule on the merits of the application yet to come (after leave is given), as it would then be going beyond the ambit of his jurisdiction by ruling on substantive issues.

2. The issue of what constitutes a prima facie case was dealt with by the Court of Appeal in **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

"It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought."

9. An arguable case or a prima facie case, it was held in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43**, is not to be arrived at by the court by tossing a coin or waving a magic wand or raising a green flag, but its ascertainment is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.
10. It is alleged that the principles of inclusiveness and public participation were never adhered to. There is no consensus between the parties that there was consultation of the stakeholders before the publication of the Bill in question. Apart from that it is contended that the contents of the Bill

negate the Constitutional spirit enshrined in Article 43 of the Constitution which guarantees every person's right to accessible and adequate housing, and to reasonable standards of sanitation. It would be foolhardy for this Court to attempt to resolve these issues in the present application. Suffice it to state that the said issues require further investigations.

11. With respect to the need to move the Court expeditiously the law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires petitioners to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest. Therefore in order to qualify for the grant of the conservatory orders sought the application must be made promptly hence undue delay in applying is a major factor and the needs of good administration must be borne in mind as courts cannot hold decision making bodies hostage. See **Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA. No. 1108 of 2004 [2006] 1 EA 116** and **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728.**
12. I therefore associate myself with the decision of **Musinga, J** (as he then was in **Republic vs. City Council of Nairobi & Another ex parte Peter Odoyo & Another Nairobi High Court Judicial Review Case No. 25 of 2011** that decisions with financial implications must be challenged promptly failing which orders seeking to stay such decisions may not be granted even where otherwise deserved.
13. The supervisory powers of the High Court are enshrined in Article 165(6) of the Constitution under which "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court". This position was recognised by the Court of Appeal in **Judicial Commission Of Inquiry Into The Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003 [2003] KLR 249** where it held that **"a tribunal inferior to the High Court is amenable to judicial review jurisdiction of the High Court and the Court of Appeal."**
14. Where however a body is constitutionally empowered to legislate, Courts will not ordinarily interfere with the exercise of the legislative authority of the body concerned in line with the doctrine of separation of powers. Courts do not make the law and only interpret the same. As was held by **Lenaola, J** in **Njenga Mwangi & Another vs. The Truth, Justice and Reconciliation Commission & 4 Others Nairobi High Court Petition No. 286 of 2013**:

> **"……..under section 29 of the National Assembly (Powers and Privileges Act) (Cap 6), Courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly but I am certain that under Article 165(3)(d) of the Constitution, this Court can enquire into any unconstitutional actions on their part".**

15. It is therefore my view that courts ought to exercise judicial restraint in matters which deal with legislative authority of County Governments. This was the position in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 [2013] eKLR** where the Court of Appeal citing **Democratic Alliance vs. The President of the Republic of South Africa & 3 Others CCT 122/11 [2012] ZACC 24** stated:

> **"The rational basis test involves restraint on the part of the Court. It respects the respective roles of the Courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society. This equally applies to executive decisions".**

16. This principle was recognised in **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice Of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400** where it was held:

> **"The doctrine of separation of powers is aimed at ensuring that the three arms of government namely the Legislature, the Executive and the Judiciary maintain the**

necessary checks and balances. This doctrine is recognised in the framework of the Constitution in that the Executive Powers are vested in the President as the head of the Executive Arm of the Government and the Legislative Power is vested in Parliament. Similarly, though not so expressed in the Constitution, the judicial power vests in the Judiciary. In addition it is important to state that our Constitution is founded on the rule of law and in order to maintain the intended constitutional balance, the three arms of government do have separate and distinct roles with only a few known overlaps depending on the degree of separation."

17. However it must be recognised that under Article 2(4) of the Constitution, any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution Constitutionally empowered to determine such an issue subject to appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since under Article 2(1) and (2) the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. As was held by the Constitutional Court of Uganda in **Kigula and Others vs. Attorney-General [2005] 1 EA 132, "the legislature should be free to legislate but the Judiciary should also be free to adjudicate…. Parliament has no power to enact a law which is arbitrary, unjust, fanciful or oppressive"**.
18. Similarly in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** it was held that

"The Judges are the mediators between the high generalities of the Constitutional text and the messy details of their application to concrete problems. And Judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary they are applying the language of these provisions of the Constitution according to their true meaning. The text is "living instrument" when the terms in which it is expressed, in their Constitutional context invite and require periodic re-examination of its application to contemporary life."

19. It is therefore clear that the mere fact that the legislative assembly enacts an Act that is not the end of the matter.
20. In this case the Bill in dispute is yet to be enactment as an Act of Kiambu County Government. It may or may not be passed. If it is passed and the petitioners are still of the opinion that the same is unconstitutional, they will be free to move this Court for appropriate orders. However to grant orders gagging the Respondents from debating the said Bill which is an exercise of legislative authority as opposed to judicial or quasi-judicial authority may amount to usurping the powers of the Respondents.
21. Conservatory orders in my view ought to be granted only where the refusal to grant the same is likely to imperil the petitioner. Where the issues raised by the petitioner may still be successfully ventilated even if the stay sought is not granted and an appropriate and efficacious remedy

granted, the Court ought not to unnecessarily interfere with the work of the other organs of Government especially if what is challenged is the core mandate of such organs which in this case is the legislative capacity of Kiambu County Assembly.

22. It is therefore my view that as the Bill is yet to be enacted, this Court ought not at this stage to interfere with the process of the enactment however ugly, undesirable, arbitrary, unjust, fanciful or oppressive that Bill may appear. If the issues raised by the petitioners are not addressed during the debating of the said Bill the petitioners will still be at liberty to move this Court for appropriate orders.
23. In the premises I decline to grant the stay as sought in prayer 3 of the Chamber Summons dated 5th November 2013. The costs of the application will be in the cause.

Dated at Nairobi this day 14th of November 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Wangai for the Petitioner

Mr Havi for the Respondent